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No. 864

In the Supreme Court of the United States

OCTOBER TERM, 1944

B. H. ROBINSON, LOWRANCE BROTHERS AND COMPANY, INC., A CORPORATION, LYNN W. MCNEILL, ET AL., SUING ON BEHALF OF THEMSELVES AND OTHER COTTON PRODUCERS SIMILARLY SITUATED, PETITIONERS

ERNEST L. DARR, HENRY A. WALLACE, W. [illegible], JUDSON, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF [illegible] FOR THE [illegible] CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 854

R. H. ROBINSON, LOWRANCE BROTHERS AND COMPANY, INC., A CORPORATION, LYNN W. MORRILL, ET AL., SUING ON BEHALF OF THEMSELVES AND OTHER COTTON PRODUCERS SIMILARLY SITUATED, PETITIONERS

v.

ERNEST L. DEAL, HENRY A. WALLACE, W. A. JULIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The first opinion of the District Court of the United States for the District of Columbia, dismissing the original plaintiffs' petition for failure to state a claim on which relief could be granted, is not reported (R. 181–182). The opinion of the United States Court of Appeals for the District of Columbia, reversing the District Court

and remanding the case for trial on the merits, is reported in 92 F. 2d 478.

The opinion of the District Court of the United States for the District of Columbia, after trial on the merits under petitioners' complaints in intervention (R. 965–970), is reported in 49 F. Supp. 366, and the opinion of the United States Court of Appeals for the District of Columbia, on appeal from the final judgment of the District Court dismissing the action on the merits (R. 992–995), is reported in 145 F. 2d 382.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on October 23, 1944 (R. 996). Petition for a writ of certiorari was filed on January 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

1. Whether, in an action against former officers of the Department of Agriculture as individuals and the present Treasurer of the United States as an individual, the Court could effect withdrawal, by them, of money from the Treasury of the United States for payment to cotton producers to

[1] It will be apparent from the statement and argument that the questions stated in the petition (p. 3) are not presented by this record.

the extent of the amount paid by the producers for so-called surplus cotton tax-exemption certificates issued under the Bankhead Cotton Act.

2. Whether such officer and former officers became and are personally liable to producers for the amount of the cashier's checks, delivered without protest to an agent of the United States not a party to the suit in exchange for surplus cotton tax-exemption certificates issued under the Bankhead Cotton Act, where collection of the checks was effected by the United States in the absence of any notice of claim by the producer with respect thereto, and the proceeds were covered into the Treasury of the United States.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The pertinent constitutional provision and statutes will be found in the Appendix, *infra*, pp. 21–23.

STATEMENT

J. Wood Thompson, A. W. Fisher, D. S. Hopson and S. J. Ward, as plaintiffs,[2] began a class suit in the District Court of the United States for the District of Columbia against the defendants on January 25, 1936, and filed their bill of complaint as a bill in equity, in which, on behalf of themselves and all other producers of cotton similarly situated, they sought relief on account of money

[2] Hereafter in this brief the petitioners will be referred to as intervenors; the original plaintiffs as plaintiffs; and the respondents as defendants.

alleged to have been paid in connection with a so-called "Surplus Cotton Tax-Exemption Certificate Pool 1935", established and operated under the Bankhead Cotton Act.[3] The relief sought, based on the claimed invalidity of the Bankhead Act, was that the defendants be enjoined from distributing a fund alleged to be in the possession and control of the defendants and to compel its distribution under court order. (R. 1–14.)

Before being required to answer, the defendants filed a motion to dismiss which was sustained by the District Court and the court thereupon entered its order dismissing the action (R. 180–181, 188). The plaintiffs appealed to the United States Court of Appeals for the District of Columbia. A restraining order pending appeal was applied for and denied (R. 182, 187–188). On appeal, the Court of Appeals reversed the District Court's order of dismissal and remanded the case for trial on the merits.[4] After remand, an answer was filed on behalf of the defendants (R. 193–206) and thereafter the plaintiffs filed their motion for dismissal of the action without prejudice (R. 217–218).

The intervenors, viewing the filing of plaintiffs' motion to dismiss without prejudice as ground for

[3] Act of April 21, 1934, c. 157, 48 Stat. 598, amended by the Act of June 20, 1934, c. 687, 48 Stat. 1184, and by the Act of August 24, 1935, c. 641, 49 Stat. 750, repealed by the Act of February 10, 1936, c. 42, 49 Stat. 1106.

[4] *Thompson* v. *Deal*, 92 F. 2d 478.

intervention by persons similarly situated, and claiming to be similarly situated, filed motions with the District Court for permission to intervene (R. 218–219, 228–229). The District Court denied the plaintiffs' motion to dismiss (R. 230), and granted intervenors' petitions to intervene and to file complaints in intervention (R. 220–236). The defendants were then permitted to file separate answers to the complaints in intervention (R. 229–230, 237) and the case, after pretrial hearing, was tried on the merits. The plaintiffs took no active part in the trial, either in person or by attorney, and the prosecution of the case was carried on exclusively by the intervenors. (R. 971–972.)

At the time of the commencement of plaintiffs' action, the defendant Henry A. Wallace was Secretary of Agriculture of the United States; the defendant Chester C. Davis was then Administrator of the Agricultural Adjustment Administration; and the defendant John B. Payne was then Comptroller of the Agricultural Adjustment Administration. The defendant Henry A. Wallace resigned his office on September 4, 1940; the defendant Chester C. Davis resigned his office on June 24, 1936; and the defendant John B. Payne resigned his office on May 18, 1936. Since these resignations none of the defendants have held the offices so theretofore held by them. (Findings I, II and III, R. 972–973.)

When this suit began, and for less than a month thereafter, the defendant Ernest L. Deal held the office of "Certificate Pool Manager". See *infra*, p. 8.[5]

The defendant W. A. Julian, at the time of the commencement of this action was and now is Treasurer of the United States (Finding V, R. 973).

On April 21, 1934, the Congress of the United States enacted what was thereafter commonly known as the Bankhead Cotton Act. The Act levied and assessed a tax on all cotton but exempted from the tax cotton to the extent of the allotment made to the farm on which grown; such allotments were made by the Secretary of Agriculture under regulations promulgated by him, and were evidenced by certificates of exemption issued by the Secretary to all producers who qualified therefor under the regulations. (Finding VI, R. 973–974.)

Under appropriate regulations, provision was also made for the issuance to producers of cotton of what were known as surplus cotton tax-exemption certificates. The certificates were to be issued by the Secretary of Agriculture in connection with the operation of what were known as surplus cotton tax-exemption certificate pools. The pools operated under the general supervision of the Director of the Division of Cotton, Agricultural

[5] Deal held this office until the repeal of the Bankhead Act, February 10, 1936, c. 42, 49 Stat. 1106 (R. 239).

Adjustment Administration, subject to the approval of the Administrator of the Agricultural Adjustment Administration, Department of Agriculture. (R. 974.)

Three pools were established under the regulations: The Surplus Cotton Tax-Exemption Certificate Pool, hereafter referred to as the 1934 pool; the National Surplus Cotton Tax-Exemption Certificate Pool, hereafter referred to as the 1935 pool; and the Special Surplus Cotton Tax-Exemption Certificate Pool, hereafter referred to as the special pool. (R. 974–975.)

The applicable regulations provided that so-called surplus cotton tax-exemption certificates, to be issued in connection with the pools, would be issued by Assistants in Cotton Adjustment in the respective counties of the States to producers of cotton, at the latter's request, in exchange only for certified checks, bank drafts or postal money-orders, made payable to the order of "Certificate Pool Manager", in an amount equal to a specified amount per pound for each pound of cotton covered by the certificate received in exchange therefor (R. 975).[6]

The surplus cotton tax-exemption certificates could be surrendered to and were accepted by Col-

[6] The Assistants in Cotton Adjustment, above referred to, were in the Extension Service of the Department of Agriculture and performed field functions for the Agricultural Adjustment Administration of the Department of Agriculture (R. 976).

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lectors of Internal Revenue, in lieu of the tax levied and assessed under the Bankhead Cotton Act which would otherwise be required to be paid in cash to Collectors of Internal Revenue on account of cotton subject to tax under the Act. After issuance, the surplus cotton tax-exemption certificates were assignable at the price per pound for which they were originally issued. (Finding VII, R. 976.)

The defendant, Ernest L. Deal, was, on September 5, 1934, designated "Certificate Pool Manager" by the Chief of the Cotton Production Section, Commodities Division, Agricultural Adjustment Administration, Department of Agriculture, and in such designation it was provided that he "as such, will manage the Surplus Cotton Tax-Exemption Certificate Pool in accordance with provisions of said Regulations and such amendments thereto as may be hereafter made by the Secretary." Although not formally designated, the defendant Deal acted as "Certificate Pool Manager" in connection with the operation of the 1935 pool and the special pool. (Finding VIII, R. 976.)

Prior to the issuance of any surplus cotton tax-exemption certificates, the Secretary of the Treasury and the Comptroller General, by appropriate official action, prescribed that all cashier's checks, money-orders, etc., received in exchange for so-called surplus cotton tax-exemption certificates, should be scheduled by the Department of Agri-

culture for collection by the Treasury Department of the United States, and that the proceeds from the collection thereof should be covered into the Treasury of the United States by appropriate covering warrant. Such action by the Secretary of the Treasury and the Comptroller General was taken under and pursuant to the terms and provisions of the Permanent Appropriation Repeal Act, 1934, ch. 756, 48 Stat. 1224. (Finding IX, R. 976–977.)

The plaintiffs and intervenors all applied to the Assistants in Cotton Adjustment in their respective counties for surplus cotton tax-exemption certificates and tendered in exchange therefor bank drafts and cashier's checks in the amount of $54,129.65.[7] The Assistants in Cotton Adjustment thereupon delivered to them the surplus cotton tax-exemption certificates, so applied for by them, and received in exchange therefor the bank drafts and cashier's checks so tendered. (R. 977–981.)

The Assistants in Cotton Adjustment, in due course, forwarded the cashier's checks and bank drafts to the Cotton Section of the Agricultural Adjustment Administration, Department of Agriculture at Washington, D. C. The drafts and checks, when received by the Cotton Section, were included with other checks in schedules of collec-

[7] The plaintiffs and intervenors received a total of $37,323.18 in benefit payments in connection with the cotton crop reduction program, and most received more benefit payments than the amounts they paid for exemption certificates (R. 979, 982–983).

tion and transmitted through the Comptroller of the Agricultural Adjustment Administration and the office of Budget and Finance to the Treasury Department of the United States for collection. The checks and drafts were thereupon and in due course collected by the Treasury Department of the United States. (R. 978–981.)

The proceeds from the checks and drafts of the plaintiffs and intervenors were, prior to the commencement of this suit on January 26, 1936,[8] covered into the Treasury of the United States by covering warrants duly and regularly signed by the Secretary of the Treasury and countersigned by the Comptroller General; upon the covering warrants the Treasurer of the United States duly indorsed his receipt for the moneys so covered. (R. 978–981.)

All money-orders, bank drafts, cashier's checks, etc., received by Assistants in Cotton Adjustment in exchange for so-called surplus cotton tax-exemption certificates in connection with the operations of the 1934 pool, 1935 pool and special pool, were all collected by the Treasury Department of the United States and the proceeds from the collection thereof officially and formally cov-

[8] A $784 cashier's check delivered by the intervenor Miller was collected by the Treasury Department of the United States on January 7, 1936, but the proceeds from the collection thereof were not formally and officially covered into the Treasury of the United States by covering warrant until April 30, 1936 (Finding XXIII, R. 984–985).

ered into the Treasury of the United States (R. 984).

Neither the Assistants in Cotton Adjustment nor the defendants, or either or any of them, at any time, made any demand on plaintiffs or intervenors, or either or any of them, that they secure surplus cotton tax-exemption certificates through or in connection with any of the pools, or that they pay any money or deliver any instruments for the payment of money, but on the contrary the Assistants in Cotton Adjustment and the defendants and each of them were wholly passive in the matter; all checks were received and certificates delivered in exchange therefor at the request of the plaintiffs and intervenors and not otherwise (Finding XX, R. 983).

The bank drafts and cashier's checks so delivered by the plaintiffs and intervenors to Assistants in Cotton Adjustment in exchange for surplus cotton tax-exemption certificates, were caused to be issued and delivered without protest and without any indication being given to the Assistants in Cotton Adjustment, or to either or any of the defendants, that the checks should not be disposed of in the manner and form in which they were thereafter disposed of, or that on account of the delivery of such checks the plaintiffs or intervenors, or either or any of them, would seek to hold the defendants, or either or

any of them, personally liable for the moneys evidenced by the checks (Finding XXI, R. 983).

The bank drafts and cashier's checks delivered by plaintiffs and intervenors, as hereinbefore set forth, were all scheduled for collection by the Department of Agriculture and collected by the Treasury Department of the United States for coverage into the Treasury of the United States, without defendants having been given any notice or intimation that plaintiffs or intervenors would make or intended to make any claim of irregularity of illegality respecting the transactions (Finding XXII, R. 983–984).

The total amount of money collected by the Treasury Department of the United States on postal money-orders, cashier's checks, etc., received by the Assistants in Cotton Adjustment in exchange for so-called cotton tax-exemption certificates issued in connection with the 1934 pool and covered into the Treasury of the United States by the covering warrants of the Secretary of the Treasury, countersigned by the Comptroller General, was $16,010,320.64. On account of the moneys so covered into the Treasury of the United States in connection with the operation of the 1934 pool, there was set up on the books of the Treasury Department of the United States, pursuant to appropriation warrants issued by the Secretary of the Treasury and countersigned by the Comptroller General, an appropriation account to which was credited the total amount of $16,010,320.64;

of the total amount so appropriated $15,978,-839.15 has been expended in accordance with the applicable Congressional appropriation and under accountable or pay warrants, signed by the Secretary of the Treasury and countersigned by the Comptroller General of the United States and upon vouchers duly issued and certified by a duly qualified certifying officer of the Department of Agriculture. The expenditures were all made by Government check issued in the usual manner by the Chief Disbursing Officer of the United States. There is now a balance to the credit of the appropriation in the amount of $31,481.49. The unexpended balance so remaining in the appropriation account is reflected on the books of the Government as follows: (1) Available for requisition by the Department of Agriculture, to the credit of the disbursing officer of the United States for expenditure within the purpose of the appropriation, $7,545.35 and (2) to the credit of the disbursing officer of the United States, representing the undisbursed balance of funds requisitioned to the credit of the disbursing officer with the approval of the Secretary of the Treasury and the Comptroller General, and for disbursement within the purpose of the appropriation, $23,936.14. (R. 985–986.)

The amounts of funds similarly collected and disposed of in connection with the 1935 pool and the

special pool are set out in the margin.[9]

The balances in the appropriation accounts represent the amount of prospective claims on issued checks to certificate depositors, which, for one reason or another, have not been paid and an amount representing "breakage". "Breakage" is that residue of the appropriated amounts that remained after applying the percentage distribution factor that resulted in the issuance of the checks that were intended as the payments to certificate depositors authorized by the Congressional appropriation. (Finding XXV, R. 988.)

The only payments made by the plaintiffs and intervenors in connection with the operation of the so-called "Surplus Cotton Tax-Exemption Certificate Pools", were those evidenced by the cashier's checks and bank drafts that were collected by the Treasury Department of the United States as set forth, *supra*, pp. 9–10 (Finding XXVII, R. 988).

The District Court made findings of fact and conclusions of law and entered its judgment dismissing the action on the merits (R. 972–990).

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[9]

	1935 Pool	Special Pool
Covered into Treasury	$3,701,183.54	$2,711,514.69
Credited to appropriation account	$3,701,183.54	$2,711,514.69
Expended	$3,639,013.53	$2,689,100.25
Balance	$62,170.01	$22,414.44
(1) Available for requisition	$53,318.47	$8,561.39
(2) To credit of disbursing officer	$8,851.54	$13,853.05
	(Finding XXIV, R. 986–987)	(Finding XXIV, R. 987–988)

The intervenors appealed to the United States Court of Appeals for the District of Columbia and that court affirmed (R. 996).

ARGUMENT

1. Petitioners contend (Pet. 11) that the writ should be granted "to settle a direct conflict between the Court of Claims and the Court of Appeals concerning title to the trust fund here involved." In the instant case, relief was denied on two grounds: (1) The money paid by plaintiffs and intervenors did not become part of a fund in the possession and under the control of the defendants as individuals but on the contrary the money was in the Treasury of the United States and so beyond the reach of the court in the instant suit and (2) the defendants, under the facts as found, were not personally liable.

In the case of *Crain* v. *United States*, 44 F. Supp. 321 (C. Cls.), certiorari denied, 317 U. S. 667, referred to by petitioners, a producer sought recovery from the United States of the amount paid by him for surplus cotton tax-exemption certificates. When considering the possible liability of the United States to suit, on account of the receipt of the money into the Treasury, the court appears to have made a distinction between the receipt of money into what it referred to as the "general fund", and the receipt of money into what it referred to as a "trust fund". This distinction was made in partial support of the real

basis of the decision, which, as stated by the court (p. 326) was that—

> Plaintiffs' allegations are insufficient to establish an obligation on the part of the United States by way of a contract, either express or implied in fact, to subject the general fund of the Treasury to the payment of the sums which they seek to recover.

The court below never reached the question which was resolved against the plaintiff in the *Crain* case. It held that on the record in this case, it appeared that the funds were in the Treasury and not under the control of the defendants as individuals; hence it was unnecessary to decide whether the United States was in any way obligated to purchasers of exemption certificates.

2. While petitioners refer (Pet. 12–14) to Section 20 of the Permanent Appropriation Repeal Act, 1934, c. 756, 48 Stat. 1224 (Appendix, *infra*, p. 23), the construction of that Act was not and is not an issue in the instant suit. Neither the plaintiffs under the original complaint nor the intervenors in their complaints in intervention sought recovery on the theory or contention that the defendants were under a plain ministerial duty to pay money to them out of the Treasury of the United States as money appropriated by Congress for payment to them. If that had been the theory on which recovery was claimed, the suit would have failed because of the absence

of indispensable parties defendant. In such a suit the Secretary of the Treasury (R. S. Secs. 246, 248, Appendix, *infra,* pp. 21–22) and the Comptroller General of the United States would have been indispensable parties and so also would the depositors of certificates whose rights were claimed to have lapsed. It has been held, moreover, that this statute does not require payments to persons in a position comparable to, though better than, that of plaintiffs and intervenors here. *Stitzel-Weller Distillery* v. *Wickard,* 118 F. 2d 19 (App. D. C.)

We note that in this connection the petitioners have quoted from the decision in the case of *Morgenthau* v. *Fidelity & Deposit Co. of Maryland,* 94 F. 2d 632, 633 (App. D. C.). However, that case is authority for the proposition that when officers of the Treasury are under a plain ministerial duty to pay money out of the Treasury, pursuant to Congressional appropriation, the courts may compel an equitable, as well as a legal performance of that duty. Before that decision could be said to be applicable to the instant case, it would need appear that at the time of the trial the Secretary of the Treasury was under a plain ministerial duty to pay money out of the Treasury to parties to the suit as against whom the court should divert the payment to the plaintiffs and intervenors on equitable grounds. This, of course, is not the situation here.

3. Neither the plaintiffs nor intervenors were entitled to personal judgment in any amount

against the defendants, or either or any of them, collectable out of their personal estates.

There is no theory under which personal liability as for a tortious taking of money can be said to have been established against the defendant Deal. The plaintiffs and intervenors dealt with the Assistants in Cotton Adjustment. It was to them that plaintiffs and intervenors tendered the cashier's checks and demanded surplus cotton tax-exemption certificates in exchange therefor. Neither the Assistants in Cotton Adjustment nor the defendant Deal made any demands; they were wholly passive. Neither at the time of the delivery of the checks nor at any time before the proceeds of the checks were in the control of the United States did plaintiffs or intervenors give any intimation that they would seek to hold any person liable for the amount of the checks so tendered. The receipt and delivery of plaintiffs' and intervenors' checks and drafts did not impose any personal liability on the defendants. *Jiminez* v. *Domenech,* 80 F. 2d 767, 768 (C. C. A. 1st), and cases cited.

The suggestion is made (Pet. 8) that the defendant, W. A. Julian, became personally liable to plaintiffs and intervenors for having received the money into the Treasury and, thereafter paid money out of the Treasury pursuant to the warrants of the Secretary of the Treasury, countersigned by the Comptroller General. *Cooke* v. *United States,* 91 U. S. 389, 398. But Julian

could not become personally liable to plaintiffs and intervenors for having as Treasurer received money into the Treasury of the United States, pursuant to the covering warrants of the Secretary of the Treasury countersigned by the Comptroller General; neither could he become personally liable to plaintiffs and intervenors for having honored the warrants of the Secretary of the Treasury countersigned by the Comptroller General of the United States, for the payment of money out of the Treasury. The facts found by the District Court show that all withdrawals under the pool appropriation accounts were made under and pursuant to accountable or pay warrants, duly signed by the Secretary of the Treasury and countersigned by the Comptroller General. The actual payment of money under these pool appropriation accounts was made by the Chief Disbursing Officer of the United States. The acts of the defendant Julian were in discharge of duties imposed upon him as Treasurer of the United States. Sections 233, 246, 248, 301 and 305 of the Revised Statutes (Appendix, *infra,* pp. 21–23). He had "no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government." *Cooke* v. *United States,* 91 U. S. 389, 399.

Finally, the petitioners suggest (Pet. 15) that the defendants Wallace, Payne, Davis and Deal may have become personally liable on account of money paid out of the Treasury under the

appropriation accounts, since the commencement of this suit. But, as the court below pointed out (R. 995)

> Purchase of extra allotment certificates was in every instance without protest or notice that claim on account thereof would be made. As a result, nothing appeared to put any one on notice of claim until the money got into the hands of the Treasurer or into the Treasury. It was then too late. Obviously, from the time of purchase the funds received therefor could be handled only in accordance with regulations set up to carry out the pool transactions. Whatever action was taken by any individual officer in relation to such funds was an act required and implied in the functions and duties incident to his office.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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